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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1837

DONALD E. ROBINSON, JR.,
Petitioner,

against

GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

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TABLE OF CONTENTS

	Page
Opinion of the Court Below	1
Jurisdiction of the Supreme Court	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
How Federal Questions Are Presented	8
Reasons for Granting the Writ	9
Point I—The decision below is not in accord with decisions of this Court which bar prosecution for conduct resulting solely from extreme police misconduct and entrapment	9
Point II—The decision below is inconsistent with decisions of this Court in that disciplinary proceedings were brought against Robinson for the same conduct for which he was acquitted at the prior criminal trial	12
Point III—Robinson's due process and equal protection rights were violated by the New York statute which grants an extremely limited review to attorneys disbarred by the Appellate Division.	13
Conclusion	15
Appendix A—Opinion of the Appellate Division	A-1
Appendix B—Report of Hearing Officer	B-1
Appendix C—Orders of the New York Court of Appeals	C-1
Appendix D—Constitutional Provisions and Statutes Involved	D-1

TABLE OF AUTHORITIES

	Page
Cases:	
Gerzof v. Gulotta, 57 App. Div. 2d 821, 395 N.Y.S. 2d 26 (1st Dep't), *appeal dismissed,* 42 N.Y. 2d 960, 398 N.Y.S. 2d 146 (1977)	14
Griffin v. Illinois, 351 U.S. 12 (1956)	13
Hampton v. United States, 425 U.S. 484 (1976)	9, 12
Helvering v. Mitchell, 303 U.S. 391 (1938)	12
Lindsey v. Normet, 405 U.S. 56 (1972)	13
Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd,* 425 U.S. 901 (1976)	9, 13, 14
People ex rel. Dowdy v. Smith, 65 App. Div. 2d 285, 411 N.Y.S. 2d 472 (4th Dep't 1978), *rev'd,* 48 N.Y. 2d 477, 423 N.Y.S. 2d 862 (1979)	12-13
People v. Isaacson, 44 N.Y. 2d 511, 406 N.Y.S. 2d 714 (1978)	10
Person v. Association of the Bar of the City of New York, 554 F. 2d 534 (2d Cir.), *cert. denied,* 434 U.S. 924 (1977)	9
In re Ruffalo, 390 U.S. 544 (1968)	9
In re Schneidkraut, 231 App. Div. 109, 246 N.Y.S. 505 (2d Dep't 1930)	13
Sherman v. United States, 356 U.S. 369 (1958)	9-10
Sorrells v. United States, 287 U.S. 435 (1932)	10
United States v. Borum, 584 F. 2d 424 (D.C. Cir. 1978).	11
United States v. Gil, 604 F. 2d 546 (7th Cir. 1979)	12
United States v. Russell, 411 U.S. 423 (1973)	9
United States v. Twigg, 588 F. 2d 373 (3d Cir. 1978)	10
United States v. West, 511 F. 2d 1083 (3d Cir. 1975)	10
Wager v. Pro, 603 F. 2d 1005 (D.C. Cir. 1979)	10
United States Constitution:	
Fourteenth Amendment	*passim*
New York Constitution:	
Article 6, Section 3	13
Statutes:	
New York Judiciary Law Section 90	13
New York Civil Practice Law and Rules Section 5601	13

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

The petitioner Donald E. Robinson, Jr. prays that a writ of certiorari be issued to review the judgment of disbarment entered against him by the Supreme Court of the State of New York, Appellate Division, Fourth Department.

Opinion of the Court Below

The opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department sought to be reviewed is reproduced in Appendix A, and is reported at 70 App. Div. 2d 209 and 420 N.Y.S.2d 430 (Sept. 28, 1979); the report of the hearing officer appointed to make factual findings by the Appellate Division, which adopted his report, is repro-

duced in Appendix B. The Court of Appeals of the State of New York denied Robinson's motion for leave to appeal from the Appellate Division in an order entered November 27, 1979, and granted a motion made by the respondent Grievance Committee of the Seventh Judicial District to dismiss the appeal taken by Robinson as of right in an order entered on February 20, 1980. Copies of these orders are reproduced in Appendix C.

Jurisdiction of the Supreme Court

Title 28, United States Code, section 1257(3) confers jurisdiction on this Court to review the judgment by a writ of certiorari. This petition for certiorari was filed within ninety days of the order of the New York Court of Appeals entered on February 20, 1980, which dismissed Robinson's appeal from the order of disbarment entered by the Appellate Division on September 28, 1979.

Questions Presented for Review

1. Whether it is a violation of Robinson's due process rights and fundamental fairness to impose the ultimate sanction of disbarment on him for actions demonstrably procured only by extreme police misconduct and entrapment.

2. Whether it is a violation of Robinson's due process rights and fundamental fairness to bring disciplinary proceedings against him for the same conduct for which he was acquitted at a prior criminal trial, after asserting an entrapment defense.

3. Whether it is a violation of Robinson's due process and equal protection rights for the law of New York to grant only an extremely limited review to attorneys who are disbarred by order of the Appellate Division, which sits as a court of first impression in disciplinary proceedings.

Constitutional Provisions and Statutes Involved

CONSTITUTIONS:

U.S. Constitution, Fourteenth Amendment
New York Constitution, Article 6, Section 3

STATUTE:

New York Judiciary Law § 90 (29 McKinney 1968 at 117-122 and Supp. 1979-1980 at 78-80).

Each of the above is set forth in Appendix D.

Statement of the Case

The Appellate Division of the State of New York ordered Robinson disbarred for acts which were incited and caused by the District of Columbia police and the F.B.I. and for which he had been acquitted at a prior criminal trial, obviously on a finding that he had been entrapped by the police authorities. Indeed, entrapment and police misconduct are the only logical explanations for what happened.

Robinson's background is impeccable. After college and two years in the Peace Corps, he went to Fordham Law School, where he was an editor of the Law Review, received awards for excellence, and was elected President of his class all three years. After law school he was an associate at Dewey, Ballantine for two years, and then joined the U.S. Attorney's office in Washington, D.C. as an Assistant U.S. Attorney. He put in 2½ years of exemplary service there, and in January 1976 he accepted a position in his home town of Rochester, New York with the Monroe County District Attorney as a Chief Assistant. (Report of hearing officer appointed by Appellate Division, App. B at 4, 31-32.) However, before he could actually take on that new job, the roof fell in on him.

In the fall of 1975, Robinson—a devoted family man with three young daughters—committed an indiscretion which may end his legal career. He had a brief sexual affair with a

prostitute named Loretta Butler, who had been a government witness in a case he had tried. The F.B.I. and the District of Columbia police learned of this incident, took advantage of his embarrassment over it and put added pressure on him by making overt threats. Through a cruel chain of events, this led Robinson to accept $700 from police officers he believed to be life-threatening mobsters and to give them certain information.

In late 1975, the Washington Police Department and the F.B.I. were running an undercover fencing operation they called P.F.F., Inc., trying to obtain leads on criminal activities. Shortly after her sexual encounter with Robinson, Loretta Butler started selling P.F.F. stolen checks. (App. B at 5.) In the course of this she told the police about her affair with Robinson, and they recruited her to arrange a meeting with him, apparently because of her unsubstantiated claims (which she later denied) that he had been responsible for the acquittal in the felony trial in which she had testified. They gave her a "down payment" for her assistance—in effect, a bounty for luring Robinson into their web. (App. B at 6.)

Butler tried to contact Robinson several times, but she kept missing him and he did not return her calls. Finally, on December 30, 1975, when she finally managed to reach him at his office, she turned the phone over to an undercover detective who was posing as an organized crime figure. The detective offered Robinson $10,000 for his assistance in pending cases and tried to set up a meeting. Robinson refused the invitation and, the very next day, gave his superiors a full report of the bribery attempt, failing only to mention Loretta Butler's role, because he was too embarrassed. (App. B at 6.)

The next day, Robinson received a second call from the supposed gangster, and again he promptly reported the call to his superiors. Once again, however, he failed to mention Loretta Butler's role. By this time, however, his superiors had been fully apprised by the undercover agents of their attempts to ensnare Robinson, and they knew full well that Robinson had not told them about Loretta Butler because he was

embarrassed about his past sexual involvement with her. (App. B at 7.)

Robinson was bothered by more than his embarrassment. He was becoming increasingly scared in his belief that he was being solicited by mobsters. Accordingly, he asked his superiors to put a pen register on his office telephone to trace incoming phone calls. But his superiors made no effort to trace the calls, because they knew full well where they were coming from. (App. B at 7.)

In early January 1976, Robinson was offered and accepted a position with the Monroe County District Attorney's Office. Since this looked like a golden opportunity to elude the "mobster" who was pressing to meet him, Robinson had his new employer ask the U.S. Attorney in Washington to waive the usual sixty-day notice requirement for departing Assistant U.S. Attorneys; but the U.S. Attorney refused to let Robinson go early, in part because Robinson's involvement with the undercover operation was still unresolved. This thwarted Robinson's efforts to move to a city where he could escape the government agents' importunities. (App. B at 8-9.)

During early January P.F.F. had Loretta Butler make repeated calls to Robinson, but he did not return them. After two weeks of this, however, Robinson's wife received a threatening telephone call at their home, in which the caller stated that "Robbie won't be around." Robinson quite understandably believed this call came from the "Mafia" figures who had been after him, although there is no evidence that this call actually originated with the undercover agents. (App. B. at 9.) This call so shook him up that two days later, when Loretta Butler called again, at her request he called P.F.F. and talked to one of the undercover detectives. Still trying to escape their trap, Robinson warned them that he was being accompanied everywhere by a bodyguard. This lie was but another desperate attempt by Robinson to elude those threatening him until he was able to leave Washington. (App. B at 9.)

A few days later Mrs. Robinson received a second threatening phone call from the person who had called earlier. That was the last straw. Fearing for his own safety and that of his family, Robinson called Loretta Butler and arranged to meet her to find out more about her accomplices. At this meeting the pressure on Robinson was increased still further. The day before the meeting, in Butler's presence and certain that she would pass it on to their victim, an undercover agent had said that Robinson "would be disappearing" if he failed to show up at a meeting with them. Sure enough, Butler dutifully relayed this threat to Robinson. (App. B at 10-11, 33.)

Two days later when one of the undercover agents called Robinson and told him to come to P.F.F.'s store-front operation, after all the pressures and threats it is little wonder that he did what they said. At the P.F.F. office he was asked whether he could assist the operation with pending cases, and he made vague statements about his ability to do so. During the discussion, one of the agents placed $200 on the counter in front of Robinson, and Robinson took it, although there was no understanding on a quid pro quo. Later that day, at the request of the undercover agents, he checked on a case against a woman the agents had asked about. He reported back that there was no pending case against her, information which was available from public sources. (App. B at 11-12.)

The next day one of the undercover agents asked Robinson about another case. This case had actually been selected by the U.S. Attorney himself; he felt that if Robinson were to disclose information about it, the government could make a better case against him at trial. (App. B at 12.) Robinson stalled for nearly two weeks, but after further prodding by the undercover agents he finally met with them again and gave them information about the case, part of which was public, part confidential, and much of which was fabricated. (App. B at 13.) During this meeting, the undercover agent offered Robinson $100, but Robinson asked for and was given $500. (App. B at 13-14.)

Robinson was subsequently arrested. At police headquarters, he waived his right to remain silent and to be assisted by

counsel, and he gave the F.B.I. a detailed and accurate description of all the events leading up to his arrest, even though he was not then aware that this information was already known to the police. (App. B at 14, 32.) Robinson even admitted knowing Butler, but he denied any sexual relationship with her. He was later tried on criminal charges arising from this conduct and was acquitted on all counts, after asserting the defense of entrapment. *United States* v. *Robinson,* Crim. No. 76-296 (D.D.C.). (App. B at 14.)

In the hearing officer's opinion below, he took note of Robinson's "impressive personal and professional history, but for the conduct under review herein." (App. B at 31.) Even more important, he found that Robinson was not predisposed to commit the acts in question, although he rejected the claim that Robinson's conduct was due to improper governmental activities or entrapment. (App. B at 28-29.) Further, the hearing officer was critical of the police misconduct which ensnared Robinson:

> "Although [Robinson's] claimed lack of culpability due to entrapment cannot be sustained,...the level of police instigation present here cannot be ignored.
>
> "On hindsight, it can be seen that [Robinson] was reluctant, at least initially, to involve himself with people he genuinely believed were members of organized crime. The undercover agents can fairly be characterized as persistent in their efforts to obtain [Robinson's] participation in their phony venture. The enlistment of Loretta Butler with the promise of payment in the event of a successful arrangement between [Robinson] and P.F.F. must be viewed as a calculated effort to ensure importuning of [Robinson]. Their casual threats made in Loretta Butler's presence regarding the consequences of [Robinson's] failure to cooperate were certain to be communicated to [Robinson] and cannot be condoned as responsible police work." (App. B at 32-33.)

How Federal Questions Are Presented

Robinson seeks to raise three federal questions in this petition, all of which were timely raised below.

1. Police misconduct and entrapment as a violation of constitutional rights: Both the referee to hear and report (App. B at 28-29) and the Appellate Division (App. A at A-3 & n.2) considered and rejected Robinson's claim that the police misconduct and entrapment violated his due process rights. In addition, Robinson fully briefed this point to the New York Court of Appeals ([Petitioner's] Memorandum In Opposition to Motion to Vacate Notice of Appeal, at 11-16), which granted a motion to dismiss his appeal without opinion.

2. "Res judicata" and double jeopardy effects of the criminal acquittal: Again, both the referee (App. B at 29) and the Appellate Division (App. A at A-2 n.1) expressly rejected Robinson's contention that his acquittal at his criminal trial after asserting an entrapment defense was a constitutional bar to later disciplinary proceedings based on the same conduct. The point was also briefed to the New York Court of Appeals (Memorandum, *supra,* at 17-18).

3. Limited right to appeal under New York law: Petitioner raised this point for the first time in his brief to the New York Court of Appeals (Memorandum, *supra,* at 18-20). Of course, the lack of right to appeal would logically not be raised until appeal was necessary and attempted.

Reasons for Granting the Writ

POINT I

The decision below is not in accord with decisions of this Court which bar prosecution for conduct resulting solely from extreme police misconduct and entrapment.

The referee appointed by the Appellate Division, after conducting six days of hearings and examining the transcript of Robinson's criminal trial, found that Robinson was *not* predisposed to commit the wrongdoing for which he is now charged (App. B at 28), that "the level of police instigation present here cannot be ignored," and that the police's activity "cannot be condoned as responsible police work." (App. B at 32, 33.) On this record a contrary conclusion could not be reached.

It is clear that the police misconduct here, which goes to the heart of these proceedings, violated Robinson's due process rights, and accordingly is a complete defense as a matter of law in these proceedings as well as at a criminal trial.[1]

A majority of the Justices of this Court have indicated that, even where a defendant is found predisposed to commit the crime,[2] his conviction may be barred by due process if there has been overreaching police misconduct. *Hampton v. United States,* 425 U.S. 484, 491 (Powell and Blackmun, JJ., concurring in the judgment), 495 (Brennan, Stewart, and Marshall, JJ., dissenting) (1976). *Accord, e.g., United States v. Russell,* 411 U.S. 423, 431-32 (1973); *Sherman v. United*

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[1] Because disciplinary proceedings are of a quasi-criminal nature, *e.g., In re Ruffalo,* 390 U.S. 544, 551 (1968); *Person v. Association of the Bar of the City of New York,* 554 F.2d 534, 536-37 (2d Cir.), *cert. denied,* 434 U.S. 924 (1977); *Mildner v. Gulotta,* 405 F. Supp. 182, 191 (E.D.N.Y. 1975), *aff'd,* 425 U.S. 901 (1976), it is appropriate to consider criminal-law defenses in such proceedings, especially where, as here, the police misconduct and entrapment are of constitutional dimension.

[2] Unlike petitioner here. App. B at 28.

States, 356 U.S. 369, 378-85 (1958) (Frankfurter, Douglas, Harlan, and Brennan, JJ., concurring in the result); *Sorrells v. United States,* 287 U.S. 435, 453-59 (1932) (separate opinion of Roberts, J., concurred in by Brandeis and Stone, JJ.); *Wager v. Pro,* 603 F.2d 1005, 1009 (D.C. Cir. 1979) ("Entrapment, normally recognized as a defense in criminal cases, can be so outrageous as to be illegal because it deprives the defendant of due process of law").[3]

If there were ever a case where police misconduct and entrapment violated fundamental fairness, this is it. It is clear from the record that:

> —But for the police's actions in ensnaring Robinson, no offense would have been committed. There was clearly no ongoing criminal activity on Robinson's part before the pressure from the undercover agents. Moreover, as found below, he did not have a predisposition to commit the offenses. His prior record was—and his subsequent record is—exemplary.
>
> —The police themselves clearly engaged in conduct repugnant to a sense of justice. Among other things, they bribed Loretta Butler into luring Robinson into their web; they effectively blackmailed him into cooperating by using his clandestine sexual relations with Butler which he wished to conceal; and, worst of all, they actually threatened to kill him if he refused to cooperate, something the referee below with remarkable understatement said "cannot be condoned as responsible police work." (App. B at 33.)

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[3] The same result obtains under the due process clause of the New York State Constitution. *E.g., People v. Isaacson,* 44 N.Y.2d 511, 406 N.Y.S.2d 714 (1978). Similarly, a number of federal appellate courts have dismissed prosecutions because of overreaching involvement by law enforcement officials which violates due process and fundamental fairness. *E.g., United States v. Twigg,* 588 F.2d 373, 381 (3d Cir. 1978); *United States v. West,* 511 F.2d 1083, 1085 (3d Cir. 1975).

—There is no doubt that the police broke down Robinson by persistent solicitations in the face of unwillingness. Robinson refused the early bribery attempts (including one for $10,000) and reported them to his superiors. For weeks he tried to ward off the undercover agents by not returning their telephone calls and by stalling. In a further effort to discourage them, he made up the story that he was under the protection of a bodyguard. Indeed, it was only after his wife had received threatening telephone calls which he linked to the agents and after the actual threat of violence transmitted through Loretta Butler that he did cooperate. As was their plan, the agents successfully played on his fear that the covert relationship with Loretta Butler would be exposed as well as on threats of bodily harm.[4]

—There is no evidence that the police actions were reasonably motivated by a desire to prevent further crime or protect the populace. Robinson was hardly a known criminal and in fact lacked the predisposition to commit even the offenses for which he is now charged. There was no danger that he would commit any crimes or do any public harm.

In short, Robinson's due process rights were violated by the gross misconduct of law enforcement officials, and accordingly he should not be disciplined for the resulting acts.

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[4] It is significant that at least one other court has found evidence that the very undercover operations which ensnared Robinson may also have induced other unwilling victims into committing crimes. *See United States v. Borum,* 584 F.2d 424, 427-29 (D.C. Cir. 1978).

POINT II

The decision below is inconsistent with decisions of this Court in that disciplinary proceedings were brought against Robinson for the same conduct for which he was acquitted at the prior criminal trial.

It is a violation of the double jeopardy clause to be subjected twice to criminal proceedings for the same offense. *E.g., Helvering v. Mitchell,* 303 U.S. 391, 399 (1938). Before the disbarment proceeding Robinson had already been tried and acquitted of criminal charges resulting from the conduct in question. Because disciplinary proceedings are of a quasi-criminal nature, fn. 1 p. 9 *supra,* it is a violation of double jeopardy to disbar him for the same conduct.

In fact, this Court's opinion in *Hampton* v. *United States, supra,* 425 U.S. 484, has recently been interpreted to mean that a successful entrapment defense negates the very existence of a crime, because criminal statutes have no application to an act committed at the government's instigation. *United States* v. *Gil,* 604 F.2d 546, 548 (7th Cir. 1979). For this reason too, further quasi-criminal proceedings after the successful assertion of an entrapment defense must be barred.

Moreover, it also violates the constitutional guararantee of fundamental fairness to bring disciplinary proceedings against Robinson after his acquittal, since the latter should be *res judicata* and a bar to the former. The Appellate Division below, in rejecting Robinson's *res judicata* claim, relied on the Appellate Division opinion in *People ex rel. Dowdy* v. *Smith,* 65 App. Div. 2d 285, 411 N.Y.S.2d 472 (4th Dep't 1978), which later was reversed by the New York Court of Appeals, 48 N.Y.2d 477, 423 N.Y.S.2d 862 (1979); in *Dowdy* the Court of Appeals held that a prior acquittal based on an entrapment defense in a criminal proceeding collaterally estops a parole board from revoking parole on the basis of the actions proved

and admitted in the criminal case. The same reasoning should operate here to bar Robinson's disciplinary proceedings.[5]

POINT III

Robinson's due process and equal protection rights were violated by the New York statute which grants an extremely limited review to attorneys disbarred by the Appellate Division.

Under the applicable New York law, Robinson, like other attorneys disbarred by order of the Appellate Division (which sits as the court of first instance in disciplinary proceedings), may appeal his disbarment as of right to the New York Court of Appeals only if the appeal raises constitutional issues. N.Y. Judiciary Law § 90(8) (McKinney 1968), incorporating by reference N.Y. Constitution, Art. 6, § 3(b)(1).[6] *Accord,* N.Y. Civil Practice Law and Rules § 5601(b)(1); see *Mildner v. Gulotta, supra,* 405 F. Supp. at 190.

Such a limited right to appeal, which is narrower than that afforded under New York law to other litigants and other professionals in disciplinary proceedings, violates Robinson's constitutional rights of due process and equal protection. *E.g., Lindsey v. Normet,* 405 U.S. 56, 77 (1972); *Griffin v. Illinois,* 351 U.S. 12, 18 (1956); *Mildner* v. *Gulotta, supra,* 405 F. Supp. at 223-28, 232-33 (dissenting opinion) (*e.g.,* comparing limited review afforded attorneys under New York law with that afforded other professionals).

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[5] The Appellate Division below also cited on the *res judicata* point *In re Schneidkraut,* 231 App. Div. 109, 246 N.Y.S. 505 (2d Dep't 1930). But in that case the court merely noted that the attorney's criminal acquittal "did not put an end to this [disciplinary] proceeding. It is not essential in a disciplinary proceeding against a member of the bar that his unfitness to remain such shall imply criminality." *Id.* at 110, 246 N.Y.S. at 506. Here the allegedly criminal acts for which Robinson was acquitted are the only basis for the disbarment decision.

[6] Both set forth in Appendix D.

Although the respondent Grievance Committee has claimed that this issue has been decided adversely to petitioner by the courts, no dispositive ruling has yet been issued. For example, in *Mildner* v. *Gulotta, supra,* 405 F. Supp. 182, a three-judge federal court abstained from deciding the issue for reasons of comity,[7] and therefore its views on the merits of the constitutional claims were only dictum. This Court affirmed, 425 U.S. 901 (1976). Some authorities have indicated[8] that this Court's affirmance in *Mildner* meant that this Court reached the merits of that suit, notwithstanding the district court's abstention, or else it would not have taken jurisdiction of the appeal. This appears to be error, since this Court's order of affirmance in *Mildner* notes that two of the Justices (Marshall and Powell) would have postponed consideration of the jurisdictional question to a hearing on the merits. This implies that the affirmance was actually a dismissal of the claims below on abstention grounds, and not on the merits.

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[7] Instead, the court held that the attorneys' remedy would be to apply to this Court for review of the state court disciplinary proceedings, as Robinson is now doing. In *Mildner* the attorneys had not even exhausted the state court appellate process prior to bringing their suit in federal court.

[8] *E.g., Gerzof v. Gulotta,* 57 App. Div. 2d 821, 822, 395 N.Y.S.2d 26, 28 (1st Dep't), *appeal dismissed,* 42 N.Y.2d 960, 398 N.Y.S.2d 146 (1977).

Conclusion

For the reasons stated herein, this petition for a writ of certiorari should be granted.

May 16, 1980

Respectfully submitted,

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APPENDIX A

A-1

In the Matter of DONALD E. ROBINSON, JR., an Attorney, Respondent. GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT, Petitioner.

Fourth Department, September 28, 1979

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee of the Seventh Judicial District. Respondent was admitted to the Bar on February 16, 1972, at a term of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings

An attorney, who, while an Assistant United States Attorney, agreed in return for the promise of money to supply confidential information and to give assistance with respect to criminal cases pending in the United States Attorney's office to persons he believed to be members of organized crime, actually members of the police and the F.B.I., and who made incomplete and inaccurate reports concerning his initial contacts with said persons, is guilty of a breach of the lawyer's duty of undivided loyalty to his client, a breach of the trust placed in him as a public official and violations of his oath of office and he is disbarred; there was no entrapment, and he was not an "unwary innocent" corrupted and motivated by the deceitful actions of government officials.

APPEARANCES OF COUNSEL

David E. Brennan (Gerard M. La Russo of counsel), for petitioner.

David Povich and *Donald E. Robinson, Jr., pro se,* for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted by order of the Appellate Division, Fourth Department on February 16, 1972. He maintains an office for the practice of law in Rochester.

The misconduct of respondent alleged in the petition and established at the hearing is detailed in the chronological account in the report of the hearing officer, Honorable DANIEL J. DE PASQUALE, J. C. C. These factual findings are fully supported by the record and respondent concedes their accuracy. Accordingly we adopt them. The misconduct may be briefly summarized as follows:

In December, 1975 and January and February, 1976 respondent, then an Assistant United States Attorney charged with the responsibility of prosecuting felonies in the District of Columbia, agreed, in return for the promise of money, to supply confidential information and to give assistance with respect to criminal cases pending in the United States Attorney's office to persons who he believed to be members of organized crime. Respondent held telephone conversations with such persons pertaining to two specific cases and to how he might be of assistance in other cases. On two occasions respondent met secretly at an undercover "fence" operation with such persons (actually members of the Washington, D.C. metropolitan police and the F.B.I. posing as mobsters). On the first occasion respondent discussed how he might be helpful and how much he would be paid for his assistance. He accepted $200 which he spent for personal purposes. He agreed to provide and later did provide information with respect to a criminal case which his office had handled. On the second occasion respondent gave confidential information with respect to another pending criminal matter including secret information concerning a forthcoming report of the Grand Jury and described how he might help in the future course of the prosecution. He was offered $100 which he refused. He asked for and received $500 which he used for his own benefit.

Respondent made incomplete and inaccurate reports to the United States Attorney's office concerning his initial contacts with persons whom he believed to be organized crime figures and, in particular, he omitted any reference to the person who was the link to such contacts, a female witness in a criminal case which he had prosecuted. Respondent in filing a supposedly complete written report at the request of Justice Department officials made false and misleading statements and again omitted any reference to such female witness. Respondent was arrested in February, 1976 and charged with bribery and obstruction of justice. He was acquitted of the charges in October, 1976.[1]

Respondent is guilty of violating Code of Professional Responsibility, DR 1-102 (subd [A], pars [3], [4], [6]), "Miscon-

1. The acquittal on the criminal charges is no bar to charges that respondent violated various disciplinary rules based on the same transactions underlying the criminal charges (See *People ex rel. Dowdy v Smith*, 65 AD2d 285 and cases cited therein; see, also, *Matter of Schneidkraut*, 231 App Div 109.)

duct", DR 4-101, "Preservation of Confidences and Secrets of a Client", DR 8-101 (subd [A]), "Action As A Public Official", and DR 9-101 (subd [C]), "Avoiding Even the Appearance of Impropriety".

We reject respondent's plea of entrapment. The investigation of respondent was not undertaken for the purpose of "implanting in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that" respondent might be prosecuted criminally. (*Sorrells v United States*, 287 US 435, 442; see *Sherman v United States*, 356 US 369, 372; *United States v Russell*, 411 US 423, 435-436.) The initial purpose of the investigation by his superiors was to test respondent's honesty and his loyalty to his oath of office as an Assistant United States Attorney—an entirely legitimate purpose in view of the reports that respondent had deliberately scuttled a criminal prosecution and that he might be susceptible to bribe offers by criminal elements.[2] It was not until January 19, 1976, after respondent had filed the false written report which omitted any reference to the female witness and to the numerous contacts that he had had with the "organized crime figures" after his report of the first conversation, that a formal criminal investigation was commenced.

Furthermore, respondent, an experienced and capable prosecutor, was clearly not an "unwary innocent" who was corrupted and motivated to follow a criminal path solely by the persuasion and deceitful actions of government officials. (See *Sherman v United States, supra*, p 372; *Sorrells v United States, supra*, pp 441-445.)

We find that respondent's deliberate decision to do business with criminal elements for the promise of money in violation of his oaths and obligations as attorney and public officer was the product of his own volition not governmental action. The prosecutor who has ignored his oath and accepted a bribe cannot charge his misconduct to the government officials who tempted him without conceding his inherent corruptibility.

Respondent is guilty of misconduct involving a breach of that duty which is at the very heart of the lawyer-client relationship—the lawyer's duty of undivided loyalty to his

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2. In this respect, the case is similar to *People v Archer* (68 AD2d 441). We reject respondent's argument based on *People v Isaacson* (44 NY2d 511) that the charges should be dismissed for prosecutorial misconduct.

client.[3] Further, he is guilty of a breach of the trust placed in him as a public official and prosecutor and violations of his oath of office of a most grievous nature.

Respondent's motion to dismiss the charges should be denied. To the extent that it is consistent with this opinion, we adopt and confirm the report of the Referee. Respondent should be disbarred.

CARDAMONE, J. P., SIMONS, HANCOCK, JR., DOERR and MOULE, JJ., concur.

Order of disbarment entered.

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3. The Professional Code of Responsibility, EC 5-1 states: "The professional judgment of a lawyer should be exercised, within the bounds of the law, *solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client*". (Emphasis added.) (See McKinney's Cons Laws of NY, Book 29, Judiciary Law, EC 5-1, p 438, n 1 and cases cited therein.)

APPENDIX B

B-1

STATE OF NEW YORK **SUPREME COURT**

APPELLATE DIVISION **FOURTH DEPARTMENT**

GRIEVANCE COMMITTEE OF THE
SEVENTH JUDICIAL DISTRICT
Petitioner

vs.

DONALD E. ROBINSON, JR.
Respondent

REFEREE'S REPORT

DANIEL A. DE PASQUALE, J.C.C.
Referee

CONTENTS

FOREWORD B-3
INTRODUCTION B-3
BIOGRAPHICAL DATA B-4
SUMMARY OF EVENTS B-5
SUMMARY OF THE PLEADINGS B-15
FINDINGS B-18
ADDITIONAL FINDINGS B-26
AFFIRMATIVE DEFENSES B-27
FACTORS IN MITIGATION B-30
APPENDIX B-34

FOREWORD

On April 10, 1978, the Appellate Division, Fourth Department, entered an Order appointing the undersigned, Daniel A. De Pasquale, J. C. C., to take proofs upon the issues of fact raised by the petition of the Grievance Committee of the Seventh Judicial District, verified December 23, 1977, alleging acts of professional misconduct by the Respondent, Donald E. Robinson, Jr., and by the answer of the Respondent thereto.

The Order further directed the undersigned to report said proofs to the Appellate Division, Fourth Department, "together with his factual findings thereon, without any recommendations thereon, with all convenient speed."

Hearings were held *in camera* at the Hall of Justice, Rochester, New York, on July 10, 11, and 12, August 9, October 31, and November 14, 1978. At the November 14, 1978 hearing, proposed findings of fact were argued by the Petitioner and the Respondent.

This report will contain a summary of the pleadings and findings of fact with respect to each charge of professional misconduct. Factors in mitigation will be set forth, as well.

INTRODUCTION

The ultimate issue of professional misconduct is largely dependent upon the fact-finder's interpretation of events which, themselves, are not in dispute. Most of the allegations of the petition are either admitted, or admitted subject to qualifications which focus almost exclusively on the Respondent's state of mind at the time of the conduct involved. Thanks to modern electronics, nearly all transactions and conversations which formed the basis of the Petitioner's charges have been recorded on video tape or audio tape and need not be reconstructed from less reliable sources.

In September and October, 1976, the Respondent was tried and acquitted in Federal Court on charges of bribery and obstruction of justice stemming from the incidents now under

review. At the outset of this disciplinary proceeding, counsel stipulated to the introduction of the entire transcript of that trial, together with all exhibits received therein. Reference to the trial transcript will be indicated as follows: (T. tr., Vol. at), while references to the transcript of the proceeding will be indicated more simply: (Tr. at).

BIOGRAPHICAL DATA

The Respondent, Donald E. Robinson, Jr., was born in Brooklyn, New York and was raised in Rochester, where he attended St. Thomas Grammar School and McQuaid Jesuit High School. (Tr. at 462). Thereafter, Respondent attended Fordham College in New York City, graduating in 1966. (T. tr., Vol. X, 1671 a).

Respondent was married in the summer of 1966 and he and his wife, Elizabeth, spent the next two years with the Peace Corps in Africa. Upon returning, Respondent entered Fordham Law School.

While in law school, Respondent won awards for excellence in Constitutional Law and Moot Court, became a member and editor of the Fordham Law Review, and was elected president of his class all three years of attendance. (Tr. at 463).

Upon graduation, Respondent accepted employment with the New York City law firm of Dewey, Ballantine, Bushby, Palmer and Wood. After approximately two years, in July, 1973, Respondent joined the United States Attorney's Office in Washington, D.C. where he was employed as an Assistant U. S. Attorney at the time the events at issue herein occurred.

After his acquittal on the related criminal charges, Respondent returned to Rochester, New York, where he is now in private practice of law. Respondent is admitted to practice by the Supreme Court, Appellate Division, Fourth Department.

Respondent presently resides with his wife and their three daughters at 4134 St. Paul Boulevard, Rochester, New York.

SUMMARY OF EVENTS

At all times germaine [sic] to this report, the Respondent, Donald E. Robinson, Jr., was employed as an Assistant U. S. Attorney in Washington, D. C., assigned to the Superior Court Division where he handled felony prosecutions. (Tr. at 179).

From October 1, 1975 to March 2, 1976, the Federal Bureau of Investigation, together with the Washington, D. C. Police Department, operated an undercover store-front fencing enterprise known as P.F.F., Inc. Disguised as a typewriter repair shop, the store-front served as an outlet for stolen property in order to provide law enforcement agencies with information concerning fencing operations and other criminal activity in the D. C. area. (T. tr., Vol. II at 98-101). Usually, each transaction was documented by means of video tape and tape recording. (Tr. at 8).

One visitor to the P.F.F. store-front was Loretta Butler, who on several occasions, sold stolen checks to the officers. (Pet. Ex. 24, 25). Miss Butler had been a government witness in a felony case prosecuted by Respondent in the summer of 1975 and, in the course of her discussions with the agents, indicated that she knew him. (Tr. at 45). The trial resulted in an acquittal and, thereafter, there was a sexual encounter between Respondent and Miss Butler.[1]

She told the agents that Respondent had somehow been responsible for the acquittal in the felony trial at which she testified. (T. tr., Vol. V at 699). She later, prior to Respondent's trial in Washington, admitted to government agents that Respondent, in fact, had never assisted her or any of her friends, particularly Leon Black. (T. tr., Vol. V at 698 and 701; stipulation, Tr. at 113-117).

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[1] At the trial, Loretta Butler related two separate occasions on which she and the Respondent met for sex. (T. tr., Vol. IV at 576-591). At the hearing, Respondent testified to only one such incident. (Tr. at 525). Because this issue is not the focus of this proceeding, no finding is made with respect thereto.

During a later visit to P.F.F., Loretta Butler was asked by the agents if Respondent would be willing to assist their operation. (Tr. at 49). Miss Butler was promised money for her assistance in arranging a meeting and a possible deal between Respondent and P.F.F. (Tr. at 74, T. tr., Vol. V at 707). In fact, as a "small down payment," Loretta Butler was later paid twenty dollars ($20.00) for providing information regarding Respondent. (T. tr., Vol. VI at 790, 849).

While at the P.F.F. store-front, Miss Butler, at the instance of the agents, attempted several times in late December to contact Respondent at his office. (Pet. Ex. 24). Finally, on December 30, 1976, Miss Butler reached Respondent at his office and handed the telephone to Detective Patrick Lilly of the Washington Police, who offered Respondent ten-thousand dollars ($10,000.00) over a period of six months if Respondent was willing to assist them.[2] (Pet. Ex. 24, Tr. at 69-72). Detective Lilly suggested that he and Respondent meet at National Airport to discuss a possible "business deal", but Respondent rejected this site and Lilly agreed to call at a later date. (Pet. Ex. 24, Tr. at 71, 478).

The following day, Respondent reported the bribery attempt to his superiors, including Deputy Chief Barcella of the Major Crimes Division. (Tr. at 479, 481-483). However, he withheld from this disclosure any references to Loretta Butler. (Tr. at 482). Barcella then relayed this information to his superior, U. S. Attorney Earl Silbert.

U. S. Attorney Silbert was apprised of Loretta Butler's role only a short while after he learned from Deputy Chief Barcella that Respondent had disclosed a bribery attempt. That morning, at approximately 11:15 a.m., Mr. Silbert was visited by several law enforcement officers involved in the P.F.F. oper-

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[2] The hearing transcript list [sic] this conversation as occurring on January 18th, as incident 374. (Tr. at 68). Petitioner's Counsel, Gerald La Russo, describes a December 30th conversation, but as incident 324. (Tr. at 33). Since the December 30th date is consistent with other facts, it is deemed correct.

ation who informed him that Loretta Butler had suggested that Respondent might be susceptible to bribery and told him that they had made efforts to verify her contentions. (Tr. at 181).

Respondent received a second phone call that same day and was told by the agent that their "boss" was coming from New York to meet with him. (Tr. at 186-187, 484-485). Respondent promptly reported this call but, once again, failed to mention Loretta Butler as a possible link, (Tr. at 187, 484-485), even after U. S. Attorney Silbert specifically asked Respondent if the contact could be female. (Tr. at 187).

During his discussion with his superiors, the option of sending Respondent to the airport wired for sound was dismissed, as well as the idea of sending a police imposter. (Tr. at 483). Respondent instead suggested that a device which can detect the origin of incoming phone calls be installed in his telephone, but because the U. S. Attorney knew the true origin of the bribery attempts, no such device was placed on Respondent's phone. (Tr. at 264, 483).

After Respondent's disclosures concerning the telephone calls, U. S. Attorney Silbert and the officers from P.F.F. present remained puzzled as to why Respondent neglected to mention Loretta Butler as the possible connection (Tr. at 184); although, at that time, there was speculation that Respondent was merely trying to conceal past sexual involvement with Miss Butler. (Tr. at 251-252). In any event, Deputy Chief Barcella and Chief Campbell of the Major Crimes Division were dispatched to examine the relevant tapes to evaluate Respondent's conduct. (Tr. at 184-186).

After the four-day, New Year's holiday weekend, Chief Campbell and Deputy Chief Barcella viewed the video tapes of incidents in which Loretta Butler either discussed or telephoned Respondent. (T. tr., Vol. IV at 382). After viewing these tapes, the "prime" impression left in Barcella's mind was that Respondent lied to Mr. Silbert to conceal an illicit relationship with Miss Butler. (T. tr., Vol. IV at 397).

After Barcella and Campbell reported back to Attorney Silbert, Mr. Silbert requested that Respondent be told to furnish a written memorandum concerning the phone calls and that the case in which Miss Butler testified be investigated. (Tr. at 193).

Barcella then reviewed the file in the Leon Black case which Miss Butler suggested had been purposely lost by Respondent. (T. tr., Vol. IV at 389-391). Although Respondent appeared to have taken all the necessary steps in the prosecution of the case, Barcella felt that the case was a strong one for the government which had "ended, inexplicably, in a not guilty verdict." (T. tr., Vol. IV at 391).

With respect to the memo, Barcella requested, orally and then in writing, that Respondent submit a memorandum, outlining the nature of the calls he had received, any ideas he may have as to the identity of the caller and any possible reasons for the call. (Pet. Ex. 2, Tr. at 193; T. tr., Vol. IV at 386-388).

Meanwhile, on January 8th and 12th, Loretta Butler attempted to reach Respondent for the P.F.F. agents. (Tr. at 489 and 493; T. tr., Vol. VI at 772-773, 860-862). Neither attempt was successful and so, on January 12, Miss Butler left a message for Respondent to call her at the P.F.F. telephone number. (Pet. Ex. 25; Tr. at 82).

During this time, Respondent interviewed for and accepted a position offered him by Monroe County District Attorney Lawrence Kurlander in Rochester, New York. (Tr. at 490). Although District Attorney Kurlander expressed some urgency to Respondent, Respondent advised him that there was a 60-day notice requirement for departing Assistant U.S. Attorneys in Washington and suggested that he call U. S. Attorney Silbert personally. (Tr. at 490). Upon his return to Washington and on January 13, 1976, Respondent notified Silbert that he had accepted the position in Rochester. (Tr. at 198-199, 274-275, 492-493). Silbert was, subsequently, contacted by Kurlander and he turned down Kurlander's request for Respondent's early

release, because of routine staffing demands and because Respondent's involvement with P.F.F. was, at that time, unresolved. (Tr. at 276-278).

On January 14th, Respondent's wife received a telephone call shortly after Respondent left for work and the unidentified caller stated that "Robbie won't be around." (Tr. at 445-447). Counsel for the Respondent has stipulated that there is no evidence that this call originated with P.F.F. or its agents. (Tr. at 444-445). Nevertheless, Respondent did connect this telephone call with P.F.F. and was concerned that efforts were being made to reach him at his home.

On January 16, Loretta Butler called Respondent at work and advised him that Detective Lilly was expecting his call. Respondent telephoned P.F.F. immediately but was told to wait for a call later that afternoon. (Tr. at 496). Detective Lilly called Respondent at approximately 4:30 p.m. and tried to extract from Respondent what, if anything, he had done to throw the Leon Black case mentioned by Miss Butler. During this telephone conversation, Respondent declined to discuss the Leon Black case and advised Lilly that he was involved in a serious criminal prosecution at his office and would be accompanied by a bodyguard for a two-week period. (Pet. Ex. 20, Tr. at 496). In fact, Respondent was not assigned any bodyguard, (Tr. at 260, 495-496; T. tr., Vol. X at 1718) and his apparent motive was to erect a barrier between himself and P.F.F.

While efforts were continuing by P.F.F. agents to determine the degree to which Respondent was corrupted, Respondent's superiors pressed their investigation from within by reminding him to submit the aforementioned memorandum regarding the phone calls. (Pet. Ex. 2, Tr. at 551; T. tr., Vol. VI at 871-872). Reluctantly, Respondent submitted a handwritten memo to Deputy Chief Barcella of the Major Crime Division. (Pet. Ex. 6; Tr. at 551-552; T. tr., Vol. VI at 873, Vol. X at 1749-R). Mr. Barcella had the memo typed and several copies

were returned to Respondent. (Pet. Ex. 7; T. tr., Vol. VI at 874; Vol. X at 1749-S).[3]

In essence, the memorandum outlined the situation as it existed on December 31, 1975 and, once again, Respondent withheld all information regarding Loretta Butler. This omission was compounded by Respondent's failure to note the repeated attempts by the agents and by Miss Butler to reach him since that time.

Because, placed against the backdrop of events known to Attorney Silbert, this memo contained material misstatements and omissions, he determined that Respondent was, indeed, attempting to conceal some violation of his duty and consequently he advised the F.B.I. that they were to conduct a formal criminal investigation of the Respondent. (Tr. at 209).

Near the end of the following week, Respondent's wife received a second telephone call from the same person at their home. (Tr. at 450; T. tr., Vol. X at 1666). Several days later, on January 26th, Respondent was contacted by P.F.F. and was asked to meet with the operation's "boss." (Pet. Ex. 25, Tr. at 498-500; T. tr., Vol. VI at 793-796; Vol. X at 1720-1721). It was agreed that the meeting would take place the following Thursday and Detective Lilly told Respondent that he would call him that morning with directions.

Respondent decided to contact Loretta Butler so that he could discuss P.F.F. with her and find out their designs for him. (Tr. at 500; T. tr., Vol. X at 1722). A rendezvous was arranged and, on the evening of January 27th, Miss Butler met Respond-

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[3] Indications are that this memo was drafted on Friday the 16th, presumably before Respondent talked to P.F.F. agents that day. At that point, there had been no further discussions between Respondent and P.F.F. since the December 31st call. Nevertheless, Respondent stated that he had "heard nothing further," which was untrue in light of the many attempts made by Loretta Butler to contact him. More importantly, on January 19th, after his conversation with Lilly on January 16th, Respondent initialed the typed memo, thereby vouching for its truthfulness.

ent on Capitol Hill.[4] During this discussion, Respondent was told that he "would be disappearing" if he failed to show up for a meeting.[5] (Tr. at 501, T. tr., Vol. V at 720; Vol. X at 1724). Because Miss Butler knew very little about P.F.F., she was unable to relay much information to Respondent.

Respondent was contacted on the morning of January 29th and was given directions to the store-front. Upon his arrival at lunchtime, Respondent was introduced to the countermen, Detective Lilly and Agent Hartman, as well as the visiting "boss" played by Richard Genova of the F.B.I. Agent Genova asked Respondent about the Leon Black case to determine whether Respondent had acted improperly. (Pet. Ex. 22; Pet. Ex. 16; Tr. at 132). Although seemingly reluctant to discuss the specifics of the Leon Black case, Respondent did state that he was able to "keep back certain evidence." (Pet. Ex. 16 at p. 4). Genova questioned Respondent about the type of assistance he could provide and Respondent gave examples of how he could sabotage pending cases. (Pet. Ex. 16 at pp. 4 & 16). Genova asked the Respondent for his assistance with a case the agents believed was still pending. (Pet. Ex. 16, p. 11, Tr. at 132-133; T. tr. Vol. VII at 964, 989-990, 1026). Before leaving the store-front, Respondent accepted two-hundred dollars ($200.00) which had been counted out and placed on the counter before him.[6] (Tr. at 134, 504). Respondent spent this two-hundred dollars ($200.00) on personal items. (Pet. Ex. 28, p. 3).

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[4] At the trial in Washington, the prosecutor argued that the date of this meeting was not January 26th but January 29th. (T. tr., Vol. V at 721-722). This would indicate that the threat made by P.F.F. was not communicated to Respondent until after this meeting and, therefore, could not possibly be the primary reason for his agreeing to meet with P.F.F. agents. I have reviewed the record and find no testimony by Miss Butler that connects this meeting to January 29th. In fact, she later states that she doesn't remember the date. (T. tr., Vol. V at 727).

[5] Miss Butler was conveying to respondent the very threat she had heard Det. Lilly make in her presence on the 26th. (Pet. Ex. 25, Tr. at 105).

[6] At both the disciplinary hearing and the earlier criminal trial, Respondent insisted that the two-hundred dollars ($200.00) was

Upon returning to the office, Respondent checked into the status of the case against Marion Toye, the name supplied him at P.F.F. (Tr. at 510, 577; T. tr. Vol. VII at 991, Vol. X at 1733). Finding no such case listed, Respondent promptly telephoned the store-front and informed them that his office had no case against such an individual. (Tr. at 510, 577-578; T. tr. Vol. VII, at 1028). Detective Lilly asked Respondent to double check and Respondent complied. The information which Respondent supplied regarding Marion Toye was available from sources other than the U. S. Attorney's office. (Tr. at 283).

The following day, Detective Lilly contacted Respondent to see if Respondent could assist P.F.F. with another pending case, that of one Milton Glover. (Tr. at 512; T. tr. Vol. X at 1734, Vol. VII at 1031). Milton Glover's name had been selected because the information which Respondent provided the agents with respect to Marion Toye was not exclusively within the possession of the U. S. Attorney's office, while any information on Glover revealed by Respondent would be unique to the U. S. Attorney's office and thus confidential. In this way, it could be determined whether or not Respondent would actually divulge information from the U. S. Attorney's office files. (Tr. at 283, 284; T. tr. Vol. VII at 1114-1115). U. S. Attorney Silbert also felt that, were Respondent to disclose information from the Glover file, the government could make a better case against him at trial. (Tr. at 285).

No action was taken by Respondent upon this request for nearly two weeks. On February 10th, Detective Lilly tele-

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payment for his appearance January 29th, at P.F.F. and was offered with no strings attached. In support of this view, he cites a statement by Agent Genova made during their discussions that day, wherein Genova indicated, "let me give you this . . . because at least you came today." (Pet. Ex. 16, p 13). Petitioner, as did the government at the criminal trial, contends that it should have been obvious to Respondent that the money was, at least in part, advance payment for information sought in the Marion Toye case. In fact, moments after Respondent accepted the money, Agent Genova stated, "This is like a test." (Pet. Ex. 16, p 28).

phoned Respondent to inquire into the progress of Respondent's efforts. (Pet. Ex. 19; Pet. Ex. 4, Tr. at 515; T. tr., Vol. VII at 1039, Vol. X at 1736). Respondent indicated that he had been busy but that he would look into the matter within the next few days. Thereafter, Respondent obtained the Milton Glover file and reviewed it. (T. tr., Vol. X at 1737).

On February 13th, Respondent contacted the undercover officers at P.F.F. to arrange a meeting and to tell them that he had information concerning Milton Glover. (Pet. Ex. 5; Pet. Ex. 18; Tr. at 516; T. tr., Vol. VII at 1047-1048). Later that afternoon, Respondent visited the P.F.F. store-front.

During the second visit to P.F.F., the information disclosed by Respondent regarding Milton Glover was partly confidential information,[7] partly material available to the general public and partly information fabricated by Respondent extemporaneously. (Pet. Ex. 17, Pet. Ex. 21; Tr. at 518-520, Tr. at 232-234, 289; 297). Certain information which might have been helpful to Milton Glover's defense was not disclosed by Respondent at this meeting. (Tr. at 298-301). Respondent conceded at the hearing that one fabrication related by him to the effect that Glover was possibly turning informant, could have been dangerous for Glover if P.F.F. was actually a Mafia-type organization as represented by the undercover officers. (Pet. Ex. 17, p. 2; Tr. at 520).

During this meeting, Detective Lilly offered Respondent one-hundred dollars ($100.00) for his information. Respondent refused and, instead, requested five-hundred dollars ($500.00) for his services. This amount was then tendered and Respondent accepted it. (Pet. Ex. 17, pp. 8-10; Pet. Ex. 21; Tr. at 521). Respondent cites both his appetite for more money and his desire to make the information appear more valuable as

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[7] Respondent disclosed that the grand jury considering Glover's case had voted an indictment. The nature of the charges it contained was also discussed. Finally, Respondent supplied the undercover officers with the name of a police witness who testified before the grand jury.

reasons for setting a higher price. (Tr. at 521-522). Shortly thereafter, Respondent left the store-front. The next day, Respondent spent nearly all of the five-hundred dollars ($500.00) on furniture ordered from a nearby store. (Tr. at 558, T. tr., Vol. X at 1771).

After the February 13th meeting, there were no further contacts between Respondent and P.F.F. or any of the undercover officers.

At approximately 10:00 p.m. on February 28th, Respondent was arrested at his home by special agent Thomas Easton of the F. B. I. and was taken to District Police Headquarters in Washington, D. C. (Tr. at 333, 522; T. tr., Vol. VIII at 1380-1381). At Police Headquarters, Agent Easton interviewed Respondent and took notes of their discussions. (Pet. Ex. 27, 28; Tr. at 333, 522-523, T. tr., Vol. VIII at 1383, Vol. X at 1749-S). Respondent's version of the events leading up to his arrest was accurate and fairly complete. Although Respondent did, on this occasion, admit knowing Loretta Butler, he denied any sexual involvement with her. (Pet. Ex. 28, Tr. at 523, T. tr., Vol. IX at 1470). At the close of this interview, Agent Easton informed Respondent that the people with whom he dealt at the P.F.F. storefront were, in fact, undercover law enforcement officers. (T. tr., Vol. IX at 1499).

Respondent was eventually tried on criminal charges arising out of his involvement with the P.F.F. store-front and was acquitted on all counts.

SUMMARY OF THE PLEADINGS

The following is a brief outline of the issues as joined by the pleadings and as narrowed by stipulations of counsel at the outset of this proceeding:

First Charge

The Petition alleges that Respondent on January 29, 1976 visited the P.F.F. store-front operation, without the authorization of his superiors, and while there, disclosed the kinds of cases he could influence and the methods at his disposal. The petition further alleges that Respondent accepted two-hundred dollars ($200.00) for the purpose of influencing his actions as an Assistant United States Attorney for the District of Columbia.

The Respondent admits having visited the P.F.F. store-front and having indicated to the undercover officers present various ways in which he could assist them, but denies that what he told them was true. With respect to the two-hundred dollars ($200.00), Respondent admits having accepted the money, but denies that he did so for the purpose of influencing his official actions.

Second Charge

The Petition alleges that, at the store-front, the undercover officer supplied Respondent with a case in which they sought information. That, after viewing the file, Respondent contacted the store-front to advise the officer that, since the case was completed, he could be of no assistance. The petition further alleges that Respondent took this action without authorization and in return for the money he had received earlier in the day.

Respondent admits informing the officers at P.F.F. that since the case in question was completed, he could be of no assistance, but Respondent asserts that he told them this primarily because he had no intention of assisting them. Respondent denies that he relayed this information in return for

the two-hundred dollars ($200.00) but, rather, insists that the money was paid to him merely for keeping his appointment at the store-front on January 29th.

Third Charge

The petition alleges that Respondent, in response to a request by Detective Lilly of the P.F.F. operation, supplied information of a confidential nature with respect to a pending case. The petition further alleges that Respondent told the officers that he would continue to assist them with the case. Finally, the petition alleges that Respondent refused the amount, one-hundred dollars ($100.00) tendered by the agent for his assistance and, instead, took five-hundred dollars ($500.00), for the purpose of influencing his actions as an Assistant U. S. Attorney.

Respondent admits reviewing the file, visiting the P.F.F. store-front and disclosing certain information to Detective Lilly. However, Respondent denies that the information was confidential because it was available to the defendant and his attorney. Respondent also admits that he told Detective Lilly that he would continue to assist him with the case, but denies that he was telling the truth when he said this. With respect to the money, Respondent admits accepting it but denies that he did so for the purpose of influencing his official actions.

Fourth Charge

The petition alleges that Respondent was requested by his superiors to submit a memorandum detailing the substance of the telephone solicitations he had received and, in response thereto, submitted a report which contained inaccurate, false and misleading statements.

Respondent admits this charge.

Disciplinary Rules

The petition alleges that Respondent's conduct violated the following disciplinary rules:

> DR 1-102(3), in engaging in illegal conduct involving moral turpitude; DR 1-102(4), in engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; DR 1-102(5), in engaging in conduct that is prejudicial to the administration of justice, and DR 1-102(6), in engaging in conduct that adversely reflects on his fitness to practice law.
>
> DR 4-101, in failing to preserve the confidence and secrets of a client.
>
> DR 5-107, in failing to avoid influence by others than his client and in accepting from one other than his client something of value related to his representation of his client.
>
> DR 7-101, in failing to seek lawful objectives of his client and in failing to exercise professional judgment in the best interest of his client.
>
> DR 8-101, in accepting something of value from a person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.
>
> DR 9-101, in stating or in implying that he was able to influence improperly or on irrelevant grounds a tribunal or public official.

Affirmative Defenses

Respondent, in addition to denying material allegations of fact set forth in the petition, raises an affirmative defense which, in essence, charges that most or all of the professional misconduct attributed to him, to the extent that it is proven, occurred as a result of improper governmental inducement amounting to blackmail, coercion, duress and entrapment.

In addition, Respondent also sets forth a defense of a res judicata and argues that acquittal of all the related criminal charges constitutes a bar to this disciplinary proceeding.

FINDINGS

The petition contains four (4) charges, followed by a listing of the six disciplinary rules alleged to have been violated. Patterned this way, the petition alleges a violation of all six disciplinary rules with respect to each charge. The proposed findings submitted by Petitioner suggest fewer violations than are alleged by the petition. Consequently, the Findings which follow address Petitioner's allegations, as narrowed by the proposed findings.

FIRST CHARGE—FIRST VISIT TO P. F. F.

DR 1-102—Misconduct

(3) With respect to Petitioner's allegation that Respondent has engaged in illegal conduct involving moral turpitude in visiting the P.F.F. store-front without authorization, disclosing the types of cases he could improperly influence and accepting two-hundred dollars ($200.00) from individuals he believed were engaged in organized crime, I find that, Respondent did not engage in "illegal" conduct and was acquitted of all criminal charges stemming from his involvement with P.F.F.

(4) With respect to Petitioner's allegation that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, I find that, while Respondent did deceive the undercover officers in misrepresenting to them the ways in which he could assist them, he owed no duty to them since he believed that they were members of organized crime.[8]

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[8] To the extent that, with this charge, Petitioner claims Respondent misrepresented his intentions and capabilities to the P.F.F. undercover officers, it departs from the basic premise of the petition, which portrays Respondent as a willing partner in the P.F.F.

(5) With respect to Petitioner's allegation that Respondent engaged in conduct prejudicial to the administration of justice, I find that since there was no real "investigation" into actual organized crime to thwart and since P.F.F. was actually comprised of undercover law enforcement officers, Respondent's conduct, at most, constituted an "attempt" to engage in conduct prejudicial to the administration of justice. Since, the Code of Professional Responsibility, unlike the Penal Law, does not condemn inchoate violations, technically, there was no violation of this disciplinary rule.

(6) With respect to Petitioner's allegation that Respondent engaged in conduct that adversely reflects on his fitness to practice law, I find that Respondent, in representing that he could improperly influence pending cases for money, did violate DR 1-102 (6). Regardless of Respondent's state of mind at the time of his visit to the P.F.F. store-front on January 29, 1976, and his reasons for being there, his mere presence demonstrates a weakness and lack of judgment and constitutes a violation of DR 1-102 (6). A prosecutor is charged with the awesome responsibility of representing the public in its quest to identify, and convict violators of the law, yet he must act in a just and impartial way. To that end, he is vested with a vast amount of control and discretion. It is not a job for the squeamish or the temptable. A prosecutor should anticipate that attempts will be made to corrupt and compromise him and he should vigorously and categorically repel all such efforts. To the extent that Respondent failed to do so, he has given cause to doubt his fitness.

DR 4-101—Preservation of Confidences and Secrets of a Client

With respect to Petitioner's allegation that Respondent failed to preserve the confidences and secrets of client [sic] in

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influence-buying scheme. If Petitioner is alleging a violation of DR 1-102 (4) because of omissions made at the time Respondent first reported the telephone solicitations to his superiors, then neither the petition nor the proposed findings recite facts which would support such a violation.

representing to the P.F.F. undercover officers the types of cases he could improperly influence, I find that the relatively meager information imparted to the officers on this January 29th visit, even if true, cannot fairly be construed as "confidences" or "secrets."

DR 5-107—Avoiding Influence by Others than Client

With respect to Petitioner's allegation that Respondent accepted from one other than his client a thing of value related to his employment in taking the two-hundred dollars ($200.00) offered by Detective Lilly, I find that Respondent did violate DR 5-107. His acceptance of the money, even if he believed it to be payment for his appearance at the P.F.F. store-front, and nothing else, constitutes an impermissible quid pro quo, and demonstrates a lack of independence from which a conflict of interest could reasonably be inferred.

DR 7-101—Representing a Client Zealously

With respect to Petitioner's allegation that Respondent failed to seek the lawful objectives of his client and failed to exercise his professional judgment in the best interests of his client, I find this disciplinary rule inapplicable to the conduct in question.

The rule, to the extent it prohibits an attorney from intentionally failing "to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules," requires an attorney to advocate his client's interests in a socially responsible and legal manner. Analysis of the underlying ethical considerations suggests that DR 7-101 (a) (1) is aimed at compelling zealous representation but within honorable limits. Conflicts of interest do not appear to be its target and would be better addressed under DR 5-107.

The rule does not prohibit an attorney from "failing to exercise his professional judgment in the best interests of his client" as is suggested by the Petitioner. DR 7-101 (B) (1) allows an attorney to, "where permissible, exercise his profes-

sional judgment to waive or fail to assert a right or position of his client." While the broad societal purpose served by the Disciplinary Rules militates against crabbed interpretations, Petitoner's inversion of this rule is inappropriate.

DR 8-101—Action as a Public Official

With respect to Petitioner's allegation that Respondent accepted something of value from a person when he knew or when it was obvious that the offer was for the purpose of influencing his actions as a public official, I find that Respondent did violate DR 8-101. Although Respondent spent considerable time at both the trial and the hearing attempting to prove that he accepted the two-hundred dollars ($200.00) on January 29th, solely as payment for his appearance at the store-front that day, the disciplinary rule prohibits a public official from accepting anything of value when it is obvious that the offer is for the purpose of influencing his actions as a public official.[9] This is an objective test. Considering the circumstances of Respondent's visit to the store-front and despite the statement by Detective Lilly to the effect that the money was payment for Respondent's keeping his appointment, it was obvious that the two-hundred dollars ($200.00) offered did come with strings attached. Even assuming, arguendo, that the payment was only for Respondent's appearance at the store-front, that in and of itself demonstrates that his actions as a public official were influenced.

DR 9-101—Avoiding Even the Appearance of Impropriety

With respect to Petitioner's allegation that Respondent stated or implied that he was able to influence improperly or upon irrelevant grounds a tribunal or public official, I find that Respondent did violate DR 9-101. Since Respondent clearly stated that he would be able to improperly influence pending cases (on grounds other than merit), he violated this rule and the fact that he may not have meant what he said is immaterial. DR 9-101 adopts a strict liability standard and it focuses on the appearance given by certain conduct, rather than evaluations of guilt or other subjective elements.

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[9] *See,* Footnote 6, *supra.*

SECOND CHARGE—MARION TOYE FILE

DR 1-102—Misconduct

(3) With respect to Petitioner's allegation that Respondent engaged in illegal conduct involving moral turpitude in disclosing that Marion Toye had been convicted and was on parole and he could be of no assistance to P.F.F., I find that Respondent did not engage in "illegal" conduct and was acquitted of all criminal charges stemming from his involvement with P.F.F.

(4) With respect to Petitioner's allegation that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, I find that Respondent did not violate DR 1-102 (4).

(5) With respect to Petitioner's allegation that Respondent engaged in conduct prejudicial to the administration of justice, I find that Respondent did not violate Dr. 1-102 (5).

(6) With respect to Petitioner's allegation that Respondent engaged in conduct that adversely reflects on his fitness to practice law, I find that Respondent's continued cooperation with P.F.F., even if feigned, demonstrates weakness and lack of judgment and constitutes a violation of DR 1-102 (6). (*See,* Finding under sub (6) of DR 1-102 in the First Charge, p. 19)

DR 4-101—Preservation of Confidences and Secrets of a Client

With respect to Petitioner's allegation that Respondent failed to preserve the confidences and secrets of a client in disclosing information on Marion Toye, I find that the information was available to the general public and cannot fairly be construed as "confidences" or "secrets."

DR 5-107—Avoiding Influence by Others Than the Client

With respect to Petitioner's allegation that Respondent accepted from one other than his client a thing of value related to his employment, I find that respondent did violate DR 5-107

by accepting the two-hundred dollars ($200.00) offered by Detective Lilly. Although Respondent insists that he accepted the two-hundred dollars ($200.00) on January 29th as payment for his appearance at the store-front that day and nothing else, it is clear from the record that the Marion Toye case was discussed before the money was counted out and placed on the counter. Under Respondent's view, he would have been free to ignore Agent Genova's request for assistance with Marion Toye's case, and yet, he did contact the store-front later that day. Even if, in Respondent's mind, he considered the money as payment for his appearance, Respondent would not have been so naive and so unrealistic as to assume that P.F.F. personnel shared this view, despite their assurances to the contrary. To the extent Respondent's acceptance of the two-hundred dollars ($200.00) constituted advanced payment for his disclosures regarding Marion Toye, it demonstates improper influence from which a conflict of interest can reasonably be inferred.

DR 7-101—Representing a Client Zealously

With respect to Petitioner's allegation that Respondent failed to seek the lawful objectives of his client and failed to exercise his professional judgment in the best interests of his client, I find this disciplinary rule inapplicable to the conduct in question. (*See*, Finding under DR 7-101 in First Charge p. 20)

DR 9-101—Avoiding Even the Appearance of Impropriety

With respect to Petitioner's allegation that Respondent stated or implied that he was able to influence improperly or upon irrelevant grounds a tribunal or public official in disclosing information regarding Marion Toye, I find that no such statement or implication was made.

THIRD CHARGE—MILTON GLOVER FILE

DR 1-102—Misconduct

(3) With respect to Petitioner's allegation that Respondent has engaged in illegal conduct involving moral turpitude in divulging information of a confidential nature to Detective Lilly and accepting five-hundred dollars ($500.00) as payment, I find that Respondent did not engage in "illegal" conduct and was acquitted of all criminal charges stemming from his involvement with P.F.F.

(4) With respect to Petitioner's allegation that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, I find Respondent did not violate DR 1-102 (4).

(5) With respect to Petitioner's allegation that Respondent engaged in conduct prejudicial to the administration of justice, I find that Respondent did not violate DR 1-102 (5).

(6) With respect to Petitioner's allegation that Respondent engaged in conduct that adversely reflects on his fitness to practice law, I find that Respondent's involvement with P.F.F., by this time, bordered on active participation and demonstrates a serious lack of judgment and moral resolve. Regardless of the origin of the pressures claimed to be motivating Respondent, his failure to resist them and follow the proper course of action casts doubt upon his abilities and constitutes a violation of DR 1-102 (6).

DR 4-101—Preservation of Confidences and Secrets of a Client

With respect to Petitioner's allegation that Respondent failed to preserve the confidences and secrets of a client in revealing to Detective Lilly information taken from the Milton Glover file, I find the Respondent violated DR 4-101. Although information which would have been helpful to P.F.F had it truly been an organized crime operation was withheld, material of a confidential nature was revealed. This constitutes

a violation of DR 4-101. Even though the aggregate effect of all of the information disclosed including Respondent's fabrications, would have been to repulse, or at least deter, genuine efforts to sabotage Milton Glover's case had they been made, it is nonetheless, appropriate to isolate the improper disclosures and measure them against the standard embodied by DR 4-101.

DR 5-107—Avoiding Influence by Others than Client

With respect to Petitioner's allegation that Respondent accepted from one other than his client a thing of value related to his employment, I find that Respondent violated DR 5-107. There is no suggestion made by Respondent with respect to the five-hundred dollars ($500.00) but that it was given in exchange for information on the Glover file.

DR 7-102—Representing a Client Zealously

With respect to Petitioner's allegation that Respondent failed to seek the lawful objectives of his client and failed to exercise his professional judgment in the best interest of his client, I find this disciplinary rule inapplicable to the conduct in question. (*See,* Finding under DR 7-101 in First Charge, p. 20)

DR 8-101—Action as a Public Official

With respect to Petitioner's allegation that Respondent accepted something of value from a person when he knew or when it was obvious that the offer was for the purpose of influencing his actions as a public official, I find that Respondent violated DR 8-101. The negotations carried on by Respondent as to the price make it crystal clear that the payment was for information, some of which was confidential.

DR 9-101—Avoiding Even the Appearance of Impropriety

With respect to Petitioner's allegation that Respondent stated or implied that he was able to influence improperly or upon irrelevant grounds a tribunal or public official, I find that

Respondent did violate DR 9-101. Even if Respondent never intended to assist P.F.F. with the Milton Glover case, his representations to that effect come within the proscription of this disciplinary rule.

FOURTH CHARGE—MEMORANDUM TO SUPERIORS

DR 1-102—Misconduct

With respect to Petitioner's allegation that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in failing to disclose the identity of the individual who instigated the call and the fact that additional contacts had been made, I find that Respondent violated DR 1-102. The allegation is admitted by the Respondent and his proposed findings of fact contain a conclusion that DR 1-102 was violated.

ADDITIONAL FINDINGS

On August 8, 1978, Petitioner called an additional witness, who testified as to facts not relevant to the original charges presented in the petition. Instead, her testimony focused on certain conduct alleged to have occurred during the course of this proceeding.

During cross-examination, it became apparent that a potential for self-incrimination existed and, so, counsel was appointed for this witness.

At a later appearance, on October 11, 1978, the witness asserted her Fifth Amendment privilege and, as a result, cross-examination by Respondent's counsel was thwarted. Respondent then moved to strike her direct testimony. This Court denied Respondent's motion, by letter dated November 9, 1978. (Ct. Ex. 1)

Subsequent examination of this issue, however, indicates that the November 9th ruling may result in a denial of

Respondent's due process rights and, therefore, the undersigned recommends that these allegations regarded Respondent's conduct during the proceeding, be re-submitted for formal consideration by the Grievance Committee. The referee will not consider them in the context of this proceeding.

By way of explanation, two points should be made. First, *Matter of Ruffalo,* 390 US 544, stands for the proposition that an attorney who is subjected to disbarment proceedings is entitled to procedural due process and this includes fair notice of the charges against him. While an attorney's conduct during a disciplinary proceeding may be a factor in determining its results (*See,* 1 Carmody-Wait 2d, Sec. 3:211 and the cases cited therein), where the conduct in question concerns activities outside the courtroom and is made the subject of additional allegations by the Petitioner, formal charges should be brought.

Second, Respondent's position that the prevented cross-examination was directed at a highly material issue of fact may be the better view. The witness in question refused to answer when the cross-examination turned to her possible consumption of drugs, which would reflect on her ability to accurately record the events to which she testified on direct. Such an issue would not be collateral. (*People* v. *Freeland*, 36 N.Y. 2d 518, 525; *People* v. *Webster*, 139 N.Y. 73, 87).

AFFIRMATIVE DEFENSES

Respondent's answer contains an affirmative defense which charges that any misconduct attributable to him occurred as a result of improper governmental inducement amounting to blackmail, coercion, duress and entrapment. This contention is set forth as Respondent's proposed finding No. 22. In essence, Respondent charges that, in the absence of any evidence indicating that he was predisposed to commit the various acts which form the basis of the Petition, the methods employed by the undercover officers were improper and excessive, the implication being that the officers not only provided Respondent

with an opportunity to commit the acts charged but took steps to ensure that Respondent actually did so. Their actions, it is charged, amount to entrapment.

Entrapment under New York State Law as applied in criminal prosecutions is measured by both objective and subjective criteria. (Penal Law Section 40.05) An analysis of the methods employed by the police, as well as the state of mind of the Defendant is required.

With respect to the methods employed by the undercover officers in this investigation, it cannot be said that Respondent's due process rights were violated or that the agents were unjustified in pursuing their inquiry into Respondent's corruptibility. Faced with the implication of a confessed prostitute and obvious thief, that an Assistant United States Attorney was for sale, the undercover agents acted responsibly in pursuing this possibility. Their suspicions, fortified by Respondent's lack of candor regarding Loretta Butler and unallayed by examination of the inexplicable Leon Black case, prompted a full investigation. Their dogged persistence, though it had disastrous consequences for Respondent, can be attributed to the agents' realization that they had little time with which to work, in light of the impending departure of Respondent for Rochester and the climax of the P.F.F. Fencing [sic] operation which was drawing close.

While the Courts of New York are not reluctant to condemn unconscionable police conduct when it occurs (*People* v. *Isaacson,* 44 N.Y. 2d 511) the malfeasance present here does not rise to the level needed to insulate its target from all consequences. To the extent that Respondent may have been unfairly pressured by the tactics employed here, it is more appropriately addressed as a factor in mitigation, *infra.* p. 30.

I find that the Respondent, at least at the time of the first contacts, was not predisposed to commit the acts which, [sic] form the basis of the Petition. Nevertheless, I find that the risks that he would succumb to the agents' solicitations were substantially increased by virtue of Respondent's own peculiar

vulnerability. Assuming, arguendo, that it was not the lure of financial rewards but the fear of exposure of his relationship with Loretta Butler that led Respondent to the threshhold [sic], this explanation is equally unacceptable. That Respondent elected to involve himself with Loretta Butler is not the focus of this proceeding. However, to the extent that he thereby provided others with a wedge to drive between himself and the agency to which he owed a duty of loyalty, he cannot be excused.

Respondent's affirmative defense of res judicata or collateral estoppel is also without merit. An acquittal on criminal charges will not bar disciplinary proceedings arising out of the same acts. (Matter of *Schneidkraut*, 231 App Div 109). Not only are different societal purposes served by professional disciplinary proceedings, but the quantum of proof required at a disciplinary proceeding is less than that required in criminal prosecution. (*See*, 76 ALR 3d 1031)

FACTORS IN MITIGATION

Because the findings of misconduct set forth above represent a technical application of the Code of Professional Responsibility to the facts as accepted by the referee, it is appropriate to list factors in mitigation. These factors represent elements of proof which would tend to soften the impact of findings, while failing to qualify as actual defenses.

Throughout this report, the undersigned has, consistent with the Appellate Division Order, scrupulously avoiding [sic] making any "recommendations" either explicitly or implicitly. The following factors are set forth only for the purpose of offering a more complete and balanced picture of the exhibits and testimony presented.

1) Respondent introduced into evidence seven letters of reference on his behalf. A brief synopsis follows:

(Resp. Ex. B)—Eugene N. Hamilton, Judge of the Superior Court of the District of Columbia (dated 7/10/78)

> Wrote that, in prosecuting matters before him, Respondent "conducted himself in a very forthright, honest, ethical and competent manner."

(Resp. Ex. C)—Lauriston H. Long, attorney, United States Department of Labor

> Wrote that his family and Respondent's grew very close while living nearby in Gaithersburg, Maryland. Observed that Respondent led a "clean" [sic] and resourceful life."

(Resp. Ex. D)—Bradford J. Race, Jr., attorney, Dewey, Ballantine, Bushby, Palmer & Wood, New York City

> Worked together and maintained close social contact while at firm with Respondent. Stated that Respondent is an "honest person, having good moral character and integrity."

(Resp. Ex. E)—David G. Larimer, attorney, Rochester, New York

> Has known Respondent since both attended McQuaid Jesuit High School in Rochester. Recommended Respondent for position with United States Attorney's Office in Washington. Wrote that Respondent was highly regarded as a prosecutor with that office.

(Resp. Ex. F)—Kenneth Michael Robinson, attorney, Washington, D.C.

> Worked together at United States Attorney's Office in Washington (no relation). Characterized Respondent as "bright, honest, hard-working and proud of his being a prosecutor." Claimed that pressures from leadership at U. S. Attorney's Office discouraged colleagues from lending support to Respondent.

(Resp. Ex. G)—Joseph D. Valentino, Assistant District Attorney, Rochester, New York

> Has known Respondent from childhood. Wrote that Respondent is "respected by all and he and his family are very well-liked in the community."

(Resp. Ex. H)—John P. Lomenzo, Jr., Attorney, Rochester, New York

> Has known Respondent since high school. Wrote that Respondent is "a good family man who spends as much time as he can with his wife and children."

2) The record reveals an impressive personal and professional history, but for the conduct under review herein. After obtaining a Catholic School education in Rochester, New York, Respondent successfully completed undergraduate school at Fordham in New York City. Following undergraduate school,

Respondent and his wife participated in the Peace Corps program and, upon their return to the United States, Respondent entered Fordham Law School.

Respondent's Law School career was marked by academic successes. His election as class president for all three years of attendance suggests that he was well-liked and respected by his fellow students.

After law school, Respondent worked for a prestigious Wall Street law firm and was highly thought of as an associate. (Resp. Ex. D). Respondent then joined the United States Attorney's office in Washington, D. C., where he established himself as a capable and hard-working prosecutor. (Resp. Exs. E and F). That the Monroe County District Attorney would offer so young an attorney a position of great responsibility with his office is also a positive reflection of Respondent's skills.

3) After Respondent's arrest on February 28, 1976, he was taken to District Police Headquarters in Washington, D.C. Respondent voluntarily waived his right to remain silent and his right to counsel in order to cooperate with the F.B.I. He submitted to a thorough interview and, measured against the facts ultimately brought to light, his version of the events leading up to his arrest was accurate and nearly complete. He cooperated with the agent even though he was, at that time, unaware that most of the information he was imparting was already known to the government.

4) Respondent was acquitted of all criminal charges arising out of the incidents now under review. Although an acquittal of criminal charges does not serve as a bar to professional disciplinary action (See p. 29 *supra*), there is authority for the proposition that such acquittal should be taken into consideration, presumably as a mitigating factor. *See,* 76 ALR 3d 1047-1049.

5) Although Respondent's claimed lack of culpability due to entrapment cannot be sustained, *supra,* pp. 28-29, the level of police instigation present here cannot be ignored.

On hindsight, it can be seen that Respondent was reluctant, at least initially, to involve himself with people he genuinely believed were members of organized crime. The undercover agents can fairly be characterized as persistent in their efforts to obtain Respondent's participation in their phony venture. The enlistment of Loretta Butler with the promise of payment in the event of a successful arrangement between Respondent and P.F.F. must be viewed as a calculated effort to ensure importuning of Respondent. Their casual threats made in Loretta Butler's presence regarding the consequences of Respondent's failure to cooperate were certain to be communicated to Respondent and cannot be condoned as responsible police work.

Respectfully submitted,

/S/ DANIEL A. DE PASQUALE

Daniel A. De Pasquale, J.C.C.
Referee

Dated: May 4, 1979

APPENDIX

PETITIONER'S EXHIBITS

Number	Description
1	A Xerox Copy of a Document entitled "Appointment Affidavits" dated 7/23/73
2	A Xerox Copy of a Document entitled "Bribery Investigation" dated 1/6/76
3	A Xerox Copy of a six-page Document entitled "Lilly-Robinson Phone Conversation" dated 1/16/76
4	A Xerox Copy of a two-page Document entitled "Lilly-Robinson Phone Conversation" dated 2/10/76
5	A Xerox Copy of a two-page Document entitled "Lilly-Robinson Phone Conversation" dated 2/13/76
6	A four-page Document entitled "To: E.J.S. from D.E.R. Re Telephone Calls about Possible Bribe"
7	A Xerox Copy of a U. S. Government Memoranda to Earl J. Silbert dated 1/19/76
8	A Xerox Copy, two pages, of Data Sheets entitled "PR 90"
9	A Xerox Copy of a two-page Handwritten Document to Donald E. Robinson from Marvin Stouffer dated 8/4/76
10	A three-page Xerox Copy of Invoices from "Busy Corner" Chair Shop
11	A Xerox Copy of a Criminal Docket, U.S. District Court for the District of Columbia
12	A Xerox Copy of a two-page Criminal Docket of Marion E. Toye
13	A Xerox Copy of six pages of Chase Manhattan Bankamericard Billing Forms
14	A Xerox Copy of six pages entitled "Chase Ledger Sheet Copy"
15	Nine Volumes of Trial Transcripts dating from September 21, 1976 to October 1, 1976
16	A 36-page Xerox Copy of a Transcript of Videotape Incident 501

17 A 16-page Xerox Copy of a Transcript of Videotape Incident 634

18 An Audiotape of a Lilly-Robinson Phone Conversation dated 2/13/76

19 An Audiotape of a Lilly-Robinson Phone Conversation dated 2/10/76

20 An Audiotape of a Lilly-Robinson Phone Conversation dated 1/16/76

21 A Videotape of Incident 634, 2/13/76

22 A Videotape of Incident 501, 1/29/76

23 The U. S. Attorney's Case File on Milton Glover

24 A Composite Videotape of Loretta Butler Incidents 310, 313, 319, 324 and 374

25 A Composite Videotape of Loretta Butler Incidents 374, 411 and 473

26 A Xerox Copy of a January, 1976 Desk Calendar

27 Ten Pages of Handwritten Notes by Thomas R. Easton

28 A Xerox Copy of an Eight-Page FBI Form 302

29 A Times Union Newspaper Article

30 A two-page letter from United States Attorney Earl J. Silbert dated 7/12/78

APPENDIX

RESPONDENT'S EXHIBITS

Number	Description
A	A Newspaper Photograph
B	A Letter from Judge Eugene N. Hamilton dated 7/10/78
C	A two-page Letter from Lauriston H. Long dated 7/10/78
D	A three-page Letter from Bradford J. Race dated 11/1/78
E	A two-page Letter from David G. Larimer dated 8/30/78
F	A two-page Letter from Kenneth M. Robinson dated 10/27/78
G	A Letter from Joseph D. Valentino, dated 9/18/78
H	A two-page Letter from John P. Lomenzo, Jr. dated 11/14/78

COURT'S EXHIBITS

1	Letter from Daniel A. De Pasquale dated 11/9/78

APPENDIX C

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4 Mo. No. 1126

In the Matter of

Donald E. Robinson, Jr.,
an Attorney &c.

Grievance Committee of the
Seventh Judicial District,

Respondent,

Donald E. Robinson, Jr.,

Appellant.

**Motion for leave
to appeal &c. denied.**

November 27, 1979

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of February A. D. 1980

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

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4 Mo. No. 123

In the Matter of

Donald E. Robinson, Jr.,
an Attorney &c.

Grievance Committee of the
Seventh Judicial District,
Respondent,

Donald E. Robinson, Jr.,
Appellant,

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

JOSEPH W. BELLACOSA

Joseph W. Bellacosa
Clerk of the Court

Appendix D

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

New York Constitution, Article 6, Section 3

[Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where

one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

New York Judiciary Law §90. Admission to and removal from practice by appellate division; character committees

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of

the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States, or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law, in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

c. The members of the committee appointed by the appellate division in each department to investigate the character and fitness of applicants for admission to the bar, shall be entitled to their necessary traveling, hotel and other expenses, incurred in the performance of their duties, payable by the state out of moneys appropriated therefor, upon certificate of the presiding justice of the appellate division by which such committee is appointed.

d. The committee on character and fitness appointed by the appellate division of the supreme court in the first judicial department and the committee on character and fitness appointed by the appellate division of the supreme court of the

second judicial department, may each, with the written consent of the justices of each of such appellate divisions or a majority of such justices, acting for their respective appellate divisions, from time to time, appoint and remove a secretary, stenographers and assistants, and procure a suitable office for each committee, properly furnished and equipped and all books, stationery, blanks, postal cards, expressage and postage stamps as shall be required for the proper performance of the duties of each such committee.

e. The salaries of such secretary, stenographers and assistants shall be fixed for each department by the justices of the appellate division in each department or a majority of them in each department.

f. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the first judicial department, shall, in the said first judicial department, be paid by the comptroller of the city of New York.

g. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the second judicial department shall be certified by the presiding justice of such department to the state comptroller who shall audit the same. The state department of taxation and finance shall pay such salaries and expenses and shall apportion the same among the counties comprising the second judicial department. Such counties shall reimburse the state for such compensation. The time and method of such apportionment and the time and method of such reimbursement shall be as specified in section seventy-four of this chapter.

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or mis-

demeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law therafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

4. a. Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

b. Whenever any attorney and counsellor-at-law shall be convicted of a felony as defined in paragraph e of this subdivision, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

c. Whenever an attorney shall be convicted of a crime in a court of record of the United States or of any state, territory or district, including this state, whether by a plea of guilty or nolo contendere or from a verdict after trial or otherwise, the attorney shall file, within thirty days thereafter, with the appellate division of the supreme court, the record of such conviction.

The failure of the attorney to so file shall be deemed professional misconduct provided, however, that the appellate division may upon application of the attorney, grant an extension upon good cause shown.

d. For purposes of this subdivision, the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

e. For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

f. Any attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.

Upon good cause shown the appellate division of the supreme court may, upon application of the attorney or on its own motion, set aside such suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice.

g. Upon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension, censure or removal from office should not be made.

h. If the attorney requests a hearing, the appellate division of the supreme court shall refer the proceeding to a referee, justice or judge appointed by the appellate division for hearing, report and recommendation.

After said hearing, the appellate division may impose such discipline as it deems proper under the facts and circumstances.

5. a. If such removal or debarment was based upon conviction for a serious crime or upon a felony conviction as defined in subdivision four of this section, and such felony conviction was subsequently reversed or pardoned by the president of the United States, or governor of this or another state of the United States, the appellate division shall have

power to vacate or modify such order or debarment, provided, however, that if such attorney or counsellor-at-law has been removed from practice in another jurisdiction, a pardon in said jurisdiction shall not be a basis for application for re-admission in this jurisdiction unless he shall have been readmitted in the jurisdiction where pardoned.

b. If such removal or debarment was based upon conviction for a felony as defined in subdivision four of this section, the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period.

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prose-

cuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid out of funds appropriated to the office of court administration for that purpose.

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therein, subject to the limitations prescribed by article six, section three, of the constitution of this state.

9. No objection shall be taken to the appointment of any member of the bar to act as referee or judge in a disciplinary proceeding under this section on the ground that he is a member of a bar association or other corporation or association which is the petitioner therein.

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor-at-law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of

an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1837

DONALD E. ROBINSON, JR.,

Petitioner,

v.

GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE.....1

POINT ONE.....8

POINT TWO.....14

POINT THREE.....19

CONCLUSION.....22

TABLE OF AUTHORITIES

Page

Cases

In Re Arnoff, 150 Cal Rptr. 479 (1978).....12

In Re Bogart, 386, F. Supp. 126 (1974).....17

In Re Daley, 549 F. 2d 469 (1977).....17

Feola v. New York State Bar Association, 37 A.D. 2d 789 (1971).....15

Javits v. Stevens, 28 N.Y. 2d 924, 382 F. Supp. 131 (1975).....19, 20

Kee Wong v. State Bar of California, 15 Cal 3d 557, 125 Cal Rptr. 482 (1975).....12

Matter of Anonymous, 40 N.Y. 2d 506, (1977).....14, 15

Matter of Finn, 286 N.Y. 464 (1941).....19

Matter of Gerzof, 35 N.Y. 2d 855, appeal dismissed 42 N.Y. 2d 960 (1977).....21

Matter of Healy, 8 N.Y. 2d 1137 (1960).....19

Matter of Peltz, 43 N.Y. 2d 844 (1978).....19

Matter of Rouss, 221 N.Y. 81, (1917).....16

Matter of Unger, 27 A.D. 2d 925, cert. den. 389 U.S. 1007 (1967).....15

Matter of Zuckerman, 20 N.Y. 2d 430, (1967).....14

Mildner v. Gulotta, 405 F. Supp 182 (1975).....20

United States v. Demma, 523 F. 2d 981 (1975).....12

United States v. Perry 478 F. 2d 1276 cert. denied, 414 U.S. 1005 (1973).....12

United States v. Russell, 411 U. S. 425 (1973).....12

Statutes

New York Judiciary Law Section 90.....7, 11, 21

New York Civil Practice Law and Rules Section 5601.....7

Rules

22 New York Court Rules and Regulations, Section 1022.19 Appellate Division, Fourth Department.....2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-1837

Donald E. Robinson, Jr.,

Petitioner

v.

Grievance Committee of the Seventh Judicial District,

Respondent

PRELIMINARY STATEMENT

This brief is submitted in opposition to the petition for a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, entered on September 28, 1979 which struck petitioner's name from the roll of attorneys of the State of New York.

STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because of certain in-

accuracies and misleading statements in the petition for a Writ of Certiorari.

The disciplinary proceeding against the petitioner was instituted pursuant to the Rules set forth by the Supreme Court of the State of New York, Fourth Department, Appellate Division Rules, specifically Rule 22 N.Y.C.R.R. §1022.19 of the Rules Relating to Attorneys, as well as the authority given to the Appellate Division under §90 of the New York State Judiciary Law.

After service of the charges upon the petitioner detailing allegations of professional misconduct and based upon the petitioner's responsive pleadings, the Appellate Division referred the issues raised by the pleadings to Referee, the Honorable Daniel A. DePasquale, for Findings of Fact. A total of six hearings were held between July and November of

1978 wherein the Referee received approximately thirty exhibits introduced by the respondent. At each hearing the petitioner appeared with counsel and cross examined the adverse witnesses and, thereafter, called witnesses in his defense.

Thereafter, on May 4, 1979 the Referee submitted a detailed report to the Appellate Division pursuant to their direction. On May 15, 1979 the Supreme Court, Appellate Division, Fourth Department heard the respondent's application to confirm the Referee's Report and in addition, heard the petitioner's application to dismiss the charges.

The allegations of professional misconduct were detailed in four separate charges and, in sum and substance, they focus upon two different meetings which this petitioner had with undercover law enforcement officials wherein

the petitioner received sums of money in exchange for information concerning cases in the U. S. Attorney's office. The two incidents taking place on January 29 and February 13 of 1976 were videotaped and voice recorded and viewed by the Referee in the disciplinary proceedings below. The petitioner during the time in question was an Assistant United States Attorney.

Petitioner's presentation of the facts to this Court are incorrect and distorted and do not include the various acts which illustrate that his conduct during the time in question was calculated and intentional.

The Referee has submitted a thorough, detailed and balanced report of all the facts presented to him as illustrated by his Findings which are included in petitioner's Appendix B. Accordingly, respondent in the interest

of brevity adopts them.

However, emphasis should be placed upon the Referee's Findings wherein petitioner's same arguments raised before this Court were found to be unacceptable and that his conduct could not be excused. Although the Referee indicated the existence of some police pressure, the Referee stated that it did not rise to the level as petitioner has portrayed. (Referee's Report, Petitioner's App. B at 28 and 29).

Moreover, the Referee in his factual Findings concluded that no entrapment existed and was unsupported by the evidence before him. (Referee's Report, Petitioner's App. B at 27- 29 and 32).

Based upon the Referee's Findings, the Appellate Division, Fourth Department found serious violations of the Lawyer's Code of Professional

Responsibility including Disciplinary Rule violations of misconduct (Disciplinary Rule 1-102), the failure of this petitioner to preserve the confidences and secrets of a client (Disciplinary Rule 4-101), violations of his duties as a public official (Disciplinary Rule 8-101), and that he failed to avoid the appearance of impropriety (Disciplinary Rule 9-101). It should be noted that the Supreme Court, Appellate Division, Fourth Department found fewer violations of the Disciplinary Rules than the Referee reported in his Findings.

Thereafter, from the Appellate Division's Order of Disbarment, dated September 28, 1979, the petitioner sought leave to appeal to the Court of Appeals of the State of New York, which was denied on November 27, 1979. (Petitioner's App. C at 1).

At that juncture, the petitioner

filed a Notice of Appeal As of Right dated December 21, 1979 pursuant to New York Judiciary Law §90(8) and 5601(b) of the New York Civil Practice Law and Rules on the basis of constitutional grounds. Respondent's motion to vacate petitioner's Notice of Appeal was granted on February 20, 1980 on the grounds that no substantial constitutional question was directly involved. (Petitioner's App. C at 2).

Reasons for Denying the Writ

POINT ONE

THE EXISTENCE OF ENTRAPMENT AND EXTREME POLICE MISCONDUCT IS CONTRARY TO THE REFEREE'S FINDINGS AND UNSUPPORTED BY THE EVIDENCE BELOW.

The petitioner urges this Court to grant a Writ of Certiorari to review his Order of Disbarment based on the fact that a defense of entrapment and gross police misconduct was established in the disciplinary hearings below. Petitioner claims, as a matter of law, that this constitutes a violation of his constitutional rights and should have been a defense in his disciplinary proceedings.

However, petitioner's argument regarding entrapment and extreme police misconduct were not found to exist by the Referee, the Honorable Daniel A. DePasquale, after hearing the evidence. The Referee in his report to the Appellate

Division made specific findings with regard to the non existence of facts which would constitute entrapment (Petitioner's App. B at 28 and 32).

Nor was petitioner's argument sustained by the Supreme Court, Appellate Division, Fourth Department, in their review of the same position advanced by the petitioner in his Motion to Dismiss the charges of professional misconduct.

The Appellate Division rejected the petitioner's contention and found that he was not entrapped (Petitioner's App. A at 3). It should be noted that the petitioner did not move at this time before the Appellate Division in his Motion to Dismiss the Petition, dated June 20, 1979, to disaffirm the Referee's factual findings but instead moved to dismiss the charges based on the Referee's Findings and in the interest of justice ([Petitioner's] Memorandum In Support of

Motion to Dismiss, at 1).

The Referee and the Appellate Division were not faced with the issue of whether or not a defense of entrapment would bar a disciplinary proceeding since the evidence produced at the disciplinary hearings did not sustain such a finding.

It should be noted that the Referee characterized the police pressure upon the petitioner as "solicitation" in his factual determination that entrapment did not exist. The Referee did indicate that the tactics employed by the undercover agents should be addressed as a factor in mitigation for the Court's consideration (Petitioner's App. B at 28).

It should be emphasized that the petitioner again raised the same issues of police pressure and entrapment in his application seeking permission to appeal to the New York Court of Appeals. The Court of Appeals denied petitioner's

application on November 27, 1979 (Petitioner's App. C at 1).

Thereafter, the petitioner sought an Appeal as of Right under the New York Judiciary Law §90(8) on the basis that his constitutional rights were violated. The Court of Appeals in reviewing the same arguments again rejected petitioner's position and dismissed the Appeal on the basis that no substantial constitutional question was directly involved in the case (Petitioner's App. C at 2).

The petitioner seeks to have this case reviewed on the grounds that the law enforcement officials were guilty of extreme misconduct. Law enforcement officials are not precluded from utilizing decoys and undercover agents and a solicitation, request or approach by law enforcement officials, in this case posing as organized crime figures,

to engage in criminal activity standing alone is not enducement to constitute an entrapment. (United States vs Russell 411 U.S. 425 (1973), United States vs Demma 523 F. 2d 981 (1975), United States vs Perry 478 F. 2d 1276) cert. denied, 414 U.S. 1005 (1973).

Since the issue of entrapment as a defense to an attorney's disciplinary proceeding has not been previously raised in New York, even though the defense was not established below, two recent California cases have examined this issue and found that even though a defense of entrapment and even a claim of duress were found to exist they did not constitute a bar to a disciplinary proceeding. (Kee Wong vs State Bar of California 15 Cal 3d 557, 125 Cal. Rptr. 482 (1975) and In Re Arnoff 150 Cal Rptr. 479 (1978).

Therefore, for the sake of argument, even in cases where a defense

is demonstrated, courts reviewing disciplinary proceedings in other state jurisdictions have held that the issue of entrapment in a criminal proceeding is not appropriate as a defense. In the present fact situation before this Court, it was not necessary for the Referee or the Supreme Court, Appellate Division or the New York Court of Appeals to address themselves to the question of whether entrapment is an affirmative defense because it was unsupported by the evidence. Therefore, this Court is not confronted with the issue to review as petitioner claims.

POINT TWO

THE ACQUITTAL OF CRIMINAL CHARGES DOES NOT BAR SUBSEQUENT DISCIPLINARY ACTION AGAINST AN ATTORNEY FOR THE SAME CONDUCT.

The petitioner has repeatedly contended that his acquittal in federal court (United States of America vs Donald E. Robinson, Jr., case #76-355M (CR) is a bar to any subsequent disciplinary hearing reviewing his ethical conduct arising out of the same circumstances as his criminal proceeding.

This premise is not consistent with the decisions established by the New York Courts. The New York Court of Appeals have repeatedly held that disciplinary proceedings against an attorney for professional misconduct are not criminal in nature but civil in character. Matter of Anonymous Attorney, 40 N.Y. 2d 506, (1977), Matter of Zuckerman, 20 N.Y. 2d 430, (1967),

cert. den. 390 U.S. 925 (1968), Matter of Unger, 27 A.D. 2d 925, cert. den. 389 U.S. 1007 (1967). Likewise the prior acquittal of a criminal offense is no bar to a subsequent disciplinary proceeding since it is well established that disciplinary proceedings are to be determined based upon a fair preponderance of the evidence and reasonable inferences drawn therefrom (Feola vs New York State Bar Association, 37 A.D. 2d 789). Using this reasoning, the standard of proof that your respondent is faced with in proving professional misconduct is lower and less than the prosecutor's standard in a criminal case that of beyond a reasonable doubt. The New York Court of Appeals in Anonymous, supra, 40 N.Y. 2d 506, 509 stated:

> "Disciplinary proceedings against an attorney for misconduct have consistently been held not to be criminal proceedings but rather serve

> to protect the Court and society from the practice of law by persons who fail to maintain the necessary standards of integrity and probity."

The Court of Appeals further reaffirmed the words of Judge Cordozo that:

> "Membership in the bar is a privelege burdened with conditions....to strike the unworthy lawyer from the roll is not to add to the pains and penalties of the crime."

(Matter of Rouss, 221 N.Y. 81, 84-5).

Furthermore, since the quantum of proof between the criminal prosecution and the disciplinary proceeding is different, the same reasoning is applied to petitioner's argument that his prior acquittal is res judicata to the subsequent disciplinary proceeding. Likewise, his claim of a defense of double jeopardy is misplaced and unavailable to an attorney in a disciplinary proceeding simply because the attorney was acquitted

in a criminal proceeding based upon the same facts.

This distinction as to whether a disciplinary proceeding is either civil or criminal has been fully explored by state and federal courts. It has been distinguished basically upon the ultimate purpose and nature of a disciplinary proceeding. The various courts confronting this issue have indicated that disciplinary proceedings are special proceedings, sui generis, in character and are the result of the inherent power of the state courts over their officers. In Re Daley, 549 F. 2d 469 (1977), In Re Bogart, 386 F. Supp 126 (1974).

In Re Daley, supra, the Court stated:

> "The essence of state bar disciplinary proceedings however, is not a resolution regarding the alleged criminality of a person's acts, but rather a determination of the moral

> fitness of an attorney to continue in the practice of law. Although conduct which could form the basis for a criminal prosecution might also underlie the institution of disciplinary proceedings, the focus is upon gauging an individual's character and fitness, and not upon adjudging the criminality of his prior acts of inflicting punishment for them."

Thus, petitioner's claim in this case that he has a defense of res judicata and double jeopardy because of his prior criminal acquital is without substance. Moreover, his assertion that his acquittal in Federal Court was based upon a defense of entrapment is incorrect. The jury in petitioner's criminal case and in criminal cases in general, make no specific findings and, therefore, we have no way of knowing the rationale of their decision or if such a defense, so raised by petitioner was in fact, proven.

POINT THREE

NEW YORK JUDICIARY LAW §90(8) DOES NOT VIOLATE PETITIONER"S DUE PROCESS AND EQUAL PROTECTION GUARANTEES BY LIMITING REVIEW OF HIS DISBARMENT ORDER TO CONSTITUTIONAL QUESTIONS

The New York Court of Appeals has traditionally dismissed Appeals as of Right on alleged constitutional grounds in matters involving discipline of attorneys where the lower court decision and the Findings of Facts by the Referee did not directly or necessarily involve a constitutional question.

The Court of Appeals has continually held that the requirement to invoke its jurisdiction to review will lie only where there is not only a constitutional question directly involved but that its involvement was controlling in a lower court decision. (In Matter of Finn, 286 N.Y. 464, Matter of Healy, 8 N.Y. 2d 1137, Javits vs Stevens, 28 N.Y. 2d 924, In the Matter of Philip Peltz, 43 N.Y. 2d 844).

Likewise, in Javits vs Stevens, supra, 382 F. Fupp 131, the United States District Court held that the provisions of the New York Judiciary Law concerning the removal from practice of attorneys and the procedures relating to review of their appeals did not violate due process or equal protection.

Although a three-judge Federal Court in Mildner v Gulotta, 405 F. Supp. 182, reviewed an attorney's claim challenging the constitutionality of §90 of the New York Judiciary Law, the Court denied the application on the basis that "the prevailing standards of federalism and comity, abstention is ....appropriate." The concurring opinions of two of the Justices explored in detail in what must be considered dictum, the constitutionality of the New York Law and found it not to violate on grounds of equal protection or due process claims.

Moreover, In the Matter of Gerzof, 35 N.Y. 2d 855 the Court of Appeals vacated the petitioner's Notice of Appeal (and denied leave to appeal), implicitly rejecting petitioner's attempt to frame a "constitutional" issue for the sole purpose of providing a colorable basis for a non existent Appeal of Right.

Gerzof's subsequent attempt to challenge the New York Judiciary Law, §90 as being unconstitutional upon grounds, among others, that it denied attorneys an Appeal as of Right, was rejected by a federal three judge constitutional court (405 F Supp 182), the Supreme Court of the United States (425 U.S. 901) as well as the New York Court of Appeals (40 N.Y. 2d 960). The latter New York Court rejected Gerzof's appeal on the grounds "that no substantial constitutional question was directly involved:..."

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain his burden of establishing under Rule 19 that there are special and important reasons why a writ should be granted. The proceedings below did not involve any important question of federal law which has not been, but should be settled by this Court. In addition, the Supreme Court, Appellate Division of New York has not decided a federal question in this case which in any way conflicts with applicable decisions with this Court or any other state court of last resort on the same matter. Therefore, the petition for Writ of Certiorari should be denied.

June 10, 1980

Respectfully submitted,

Gerard M. LaRusso
Of Counsel